Oberle-Jordre Company, Division of the Bishopric Products Company *and* Chauffeurs, Teamsters, Warehousemen and Helpers of America, Local 135. Case 25-CA-15539

14 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 18 April 1984 Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in limited support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Oberle-Jordre Company, Division of the Bishopric Products Company, New Paris, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In discussing par. 6(b) of the complaint concerning Nickell's discharge, the judge stated that the Respondent advised the Union 23 September 1982 that "it was no longer in need of a Union." The record shows, consistent with the judge's earlier description of the Respondent's letter in the background section of his decision, that the Respondent informed the Union that it was "not in need of an agreement with you at this time."

The judge found that 14 February 1982 was Nickell's last day of work and that he was effectively terminated as of the next day. The Respondent introduced into evidence a summary of its payroll record which indicates Nickell worked 2 hours 23 February 1982. This entry for 23 February is not however, substantiated by the actual payroll records which also were introduced into evidence. This discrepancy does not affect our adoption of the judge's finding that Nickell was discharged 15 February 1983, and any question of Nickell's subsequent earnings can be resolved in the compliance stage of the proceeding.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on August 24 and October 24 and 25, 1983,[1] at Richmond, Indiana. The charge was filed on May 20 by Chauffeurs, Teamsters, Warehousemen and Helpers of America, Local 135 (the Union). The original and amended complaints issued July 1 and July 15, respectively. The amended complaint was further amended on August 5, 15, and 31. In its final form the complaint alleges that Oberle-Jordre Company, Division of The Bishopric Products Company (Respondent), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). More particularly the complaint alleges that Respondent violated Section 8(a)(1) by threatening its employees with discharge because they supported or assisted the Union and by interrogating them regarding their union membership, activities and sympathies; violated Section 8(a)(1) and (3) by reducing the hours of employment of Robert Nickell and thereafter discharging him for discriminatory reasons; and violated Section 8(a)(1) and (5) and Section 8(d) by unilaterally subcontracting bargaining unit work, withdrawing recognition from the Union, and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees. Respondent filed timely answers to the complaints and amendments in which it denied the commission of any unfair labor practices. The allegations and answers frame the issues.

The General Counsel, Charging Party, and Respondent were all represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. The General Counsel and Respondent filed briefs.[2] On the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation, maintains its principal offices and places of business in Cincinnati and New Paris, Ohio, and is and has been at all material times, engaged in the business of general construction contracting and related services. During the 12-month period ending August 5, 1983, a representative period, Respondent, in the course and conduct of its business operations at its New Paris, Ohio facility, purchased and received goods and materials valued in excess of $50,000 which were shipped to the Respondent at its New Paris, Ohio facility directly from points outside of the State of Ohio. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] All dates are in 1983 unless otherwise indicated.

[2] Respondent also filed a motion to correct transcript and the General Counsel filed a response in opposition. I find the requested corrections warranted and the motion is granted.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Business of Respondent between 1947 and March 1, 1982

The Respondent, between 1947 and March 1, 1982, was primarily engaged in the business of installing boilers, turbines, and other equipment at power plants and other construction sites throughout the United States. In Richmond, Indiana it maintained a large facility where it fabricated tools and equipment to service its operations at the construction sites and stored a very extensive inventory of tools, parts, and other equipment.

In order to ship the various boilers, turbines, and other equipment to the construction sites, Respondent also maintained a fleet of trucks which were loaded at the Richmond facility by means of overhead monorails. A large machine shop was housed at the Richmond plant which was used to machine and repair tools as well as a garage where its vehicles were maintained and repaired.

Employees working at the Richmond facility included driver-mechanics, pipefitters, ironworkers, operating engineers, and millwrights, all represented by labor organizations. Each craft was responsible for its own type of work although occasionally a driver might be required to do work at a jobsite which was regarded as within the jurisdiction of one of the other trades. On these occasions the driver would receive the contractual hourly wage of the craft whose work he performed. The use of forklifts both at the construction sites and at the Richmond facility to load and unload equipment was extensive and although the operation of the lifts was work claimed by the operating engineers, in practice all crafts were engaged in their operation. Similarly, any employees regardless of craft, might be used to pick up supplies and carry them to Richmond or the construction sites.

Due to the nature of the work performed and the distances to be covered, Respondent's fleet of vehicles was large and varied. Besides the aforementioned forklifts, Respondent's fleet also included tractors and trailers for the over-the-road hauling of equipment, pickup trucks which were assigned to foremen for use in traveling between jobsites and for the use of employees to run errands and pick up supplies and company officials' automobiles for business use.

The employees classified as driver-mechanics were covered by a collective-bargaining agreement with the Teamsters. They were assigned the job of driving the over-the-road trucks, hauling equipment to and from the jobsites. Likewise, the same employees were responsible for the maintenance and repair of the fleet. In fact, about 75 percent of the automobile mechanic work done in Richmond and at the construction sites was done by employees of Respondent in the Teamsters' unit. The rest was done by subcontractors.

Insamuch as Respondent did not have an Interstate Commerce Commission permit, its drivers could only haul its own equipment on interstate trips where a particular job required the hauling of equipment belonging to another company, the job had to be subcontracted to another carrier, one owning such a permit.

Although the primary business of Respondent was the servicing and tooling of construction sites, particularly power plants, it was also engaged, to a minor degree, in the moving and installing of customers' equipment in the Richmond area. When necessary, the Respondent sometimes warehoused customers' equipment at its Richmond facility prior to installing it at its new location. This local business, however, was merely incidental and the profits therefrom were considered as just an offset to the overhead of maintaining the facility, the main purpose of which was to support the construction business.

In connection with this local work, the Respondent's truck driver-mechanics hauled customers' equipment between the local sites and to and from the Richmond warehouse. In order to engage in this activity, it was necessary for Respondent to acquire a permit from the Indiana Public Service Commission. As for the loading and unloading of the equipment on these local jobs, all of the employees, regardless of craft, participated in this work on an as-needed basis. Similarly, any employee might be called upon to pick up and deliver supplies to the local sites. Actual installation of equipment, rigging, and setting up were performed by members of each craft according to the jobs' requirements. Only occasionally did driver-mechanics engage in this work and then only if the work load demanded it. On these occasions the truck driver-mechanics were paid at the contract rate of the craft whose work he was doing.

Respondent, at various points in time, here under discussion, recognized and signed labor agreements with the various craft unions representing their employees including the Teamsters. The most recent collective-bargaining agreement with Teamsters Local 135 was effective for the period May 9, 1980, to February 28, 1983, and covered a unit of warehouse foremen, mechanics, mechanic helpers, greasers, lowboy drivers, and light, heavy, and over-the-road truck drivers.

2. March 1, 1982, to the present

On March 1, 1982, Bishopric Products Company of Cincinnati acquired certain of Respondent's operations and assets. With the acquisition, it was intended that the purchased equipment be moved to Cincinnati along with the remote construction operation. The local industrial work was to be abandoned and the Richmond facility closed down. In furtherance of this plan, the parent company ordered that all of the employees at the Richmond facility be laid off since there was no longer any work to be done at that location. However, several employees,[3] including truckdriver-mechanic Darrell Nickell, requested that they be kept on to work on an as-needed basis, rather than be laid off, and agreed to waive call-in pay if, when they reported in, there was no work available.

[3] Besides Nickell, these included Lester Philback, ironworker; Bob Dillman, millwright; Charlie Dunham, operating engineer; and Steve Smallwood, operating engineer.

In June 1982 Bishopric changed its plan and determined that whereas before it had decided to transfer its remote construction business to Cincinnati and dissolve its local business, it would now follow through on the Cincinnati transfer, but would continue its local industrial operation by reorganizing it and moving it to a smaller, compact facility. In keeping with the change in plans Bishopric closed down its servicing and tooling of remote construction sites from Richmond, as well as its fabrication and machine shop which supported that operation, and removed it to Cincinnati. It also reorganized its local installation work by eliminating the warehousing aspect of it and emphasizing the direct hauling of equipment from one site to another. The effect of this change was expected to be the discontinuance of some local hauling to and from the warehouse and the elimination of a good deal of loading and unloading at the warehouse.

The new and smaller facility eventually decided upon turned out to be a small facility leased in New Paris, Ohio, and the actual move took place August 20, 1982. The new facility was about one-eighth the size of the Richmond facility, incapable of storing customers' equipment and without machine and fabrication shops. Unlike the Richmond facility, New Paris had no railroad access and its outside area was only about 5 percent of that at the Richmond facility.

As a consequence of the changes resulting from the March acquisition and the June operational decision, available truck driver-mechanic work was drastically reduced. Thus, the need for servicing and tooling of remote construction sites was eliminated as was the driving connected therewith. The need for the machine shop and garage to service the over-the-road vehicles was similarly obviated by the move of the over-the-road operation to Cincinnati. Similarly, the elimination of the necessity of hauling customers' machinery to and from the Richmond warehouse, in connection with the storage part of the local industrial business, has resulted in a decrease in drivers' work, both in driving time and in loading and unloading time. With the elimination of the necessity of employing drivers to do intrastate hauling, Respondent determined that it did not need to renew its Indiana Public Service Commission permit and therefore let it lapse.

Following the decision in June to open up the smaller operation in New Paris, what vehicle maintenance was required for the few trucks retained at New Paris was contracted out to local garages. Such work as the changing of tires, lubrication, installing of spark plugs, etc., amounted to less than 8 hours per week. It was therefore considered more economic to have it done by outsiders than to retain driver-mechanic employees to do it.

Following the establishment of the New Paris facility, the truck driver-mechanics' hauling and maintenance work were eliminated. The interstate hauling of customers' equipment continued to be subcontracted out just as before. Supplies continued to be picked up by all employees still on an as-needed basis. Forklift work was done by operating engineers who continued to claim jurisdiction over the work.

As far as available work was concerned, in March, following the termination of most of the employees, truck-driver-mechanic duties were extremely limited and, what little work there was, was given to Nickell except for a very few scattered hours worked by one other driver. Nickell, from March 1982 until February 28, 1983, when he was eventually laid off, worked a little over a thousand hours of truckdriver-mechanic related work. Ninety-nine of these hours were related to the move to New Paris and were temporary in nature. Subtracting the move-related work from his regular duties, it is clear that Nickell averaged less than 20 hours of truckdriver-mechanic[4] work per week during his last year of work and performed no such work at all on about 40 percent of the regular workdays. He worked full 40-percent workweeks on only six occasions. In January and February 1983 Nickell averaged less than 10 hours of truck-driver-mechanic work. It is quite apparent from testimony and from company records that after March 1, 1982, there was insufficient truckdriver-mechanic work available to employ one truck driver-mechanic full time.

3. Withdrawal of recognition

With the expiration date[5] of Respondent's collective-bargaining agreement approaching, the Union, on August 27, 1982, sent notice to Respondent at its Richmond address that it desired to meet to negotiate a new contract. On September 23, 1982, A. V. Lang, president of Respondent, responded in writing, advising the Union that it was no longer operating a facility at Richmond and was therefore no longer in need of a labor agreement with the Union. Lang concluded his letter with a notice that the agreement between the Union and the Respondent was terminated. Lang testified that he sent the letter because there was only one truckdriver-mechanic left working for Respondent, namely, Robert Nickell, and he was only working part time. That being the case, it was Lang's understanding that there was no longer any obligation to retain a bargaining relationship with the Union.

The Union made no reply to Lang's letter but on February 24 sent contract proposals to the Richmond facility along with a request to meet to negotiate. The cover letter accompanying the contract proposals was addressed to Paul Oberle Sr. and was signed by Business Representative Arthur Hicks. Oberle replied that following day, calling Hicks' attention to Lang's previous letter, and enclosing a copy. He advised Hicks that he, Oberle, would have to abide by Lang's decision, and that if there were to be any renegotiation of the contract, it would be Lang who had to be contacted. Oberle then added that it was his understanding that Nickell had signed up for unemployment compensation on February 15, although he had not been given a layoff slip. He advised Hicks finally that Nickell would be terminated as of February 28.

On March 9, Hicks wrote Lang, again requesting negotiations and suggesting several dates. He added that he

[4] Nickell did some work belonging to the crafts also and was compensated at the higher rate of pay.

[5] February 28, 1983.

would also like to meet with Lang to discuss a grievance filed by him of behalf of Nickell. Lang replied to this letter on March 29 reiterating that Respondent no longer had facilities in Richmond nor a bargaining unit for which the Union could be the collective-bargaining agent. He repeated that he had already given notice of the termination of the 1980–1983 agreement and reiterated that there was no basis for further contract negotiations. With regard to the Nickell grievance, Lang stated that the agreement had expired as of midnight February 27 and, since the event which gave rise to the grievance occurred on February 28, namely, his termination, there was no agreement in effect which could have been violated.[6] He offered to meet and discuss the matter if Hicks chose to do so.

4. The termination of Nickell and the alleged 8(a)(1) incidents

In July 1982, Paul Oberle Sr. advised Robert Nickell that Respondent was moving across the state line and would not have to take the Teamsters with it. He told Nickell that he wanted him to go to the union hall and take out a withdrawal.[7] Nickell replied that he would "check on it." The following day Nickell went to the union hall and told Hicks that Oberle had told him to take a withdrawal. Hicks got angry and declared that Oberle had acted illegally. The next day Nickell reported to Oberle that he had told Hicks about their earlier conversation. Oberle then got angry and told Nickell that he should not have told Hicks that he, Oberle, had sent him to the union hall to get the withdrawal.

Between July and December 1982 Nickell was approached several times by Ron Sprenkle and asked if he had yet decided whether or not he was going to withdraw from the Union. On the first occasion Sprenkle told him that if he withdrew from the Union and stayed with the Respondent, he would receive $6 per hour in wages and no benefits.[8] In a second conversation Sprenkle told Nickell that if he would withdraw from the Union and stay with the Respondent he would receive $8 per hour and some insurance.[9] At the time Nickell was receiving the contractual $11.20 per hour in wages. In November 1982, in a third conversation, Sprenkle asked Nickell what he had decided concerning withdrawing from the Union.[10] Nickell replied that he could not decide.

One day, the following January, while Nickell was in Sprenkle's office, Sprenkle told him that he had a small press that he wanted to move the following day. He asked Nickell to take fellow employee Mark Spille with him and show him how to drive the semi. Nickell replied that Spille was already doing all of his work and that the only thing Spille was not doing was driving the semi. Nickell asked, "If you were me, would you show him how to drive a semi?" Sprenkle did not reply but Paul Oberle Sr., who had been standing outside Sprenkle's office, came in, went face-to-face with Nickell and said, "I'll fire your f—ing ass."

With regard to Nickell's layoff on February 28 Paul Oberle Sr. testified as follows:

> Q. When was the decision made to lay off Mr. Nickell?
>
> A. It was . . . when . . . we were notified that we had to renegotiate the contract.

Oberle explained that he was *abiding* by Lang's letter to the Union, dated September 23, 1982, wherein he gave notice of the termination of the contract. As noted earlier, on February 25 Oberle wrote a letter to Hicks in which he acknowledged receiving the Union's contract proposals dated February 24, and wrote:

> I will have to abide by the letter that was written September 23, 1982. It is my understanding Mr. Robert D. Nickell did sign up for unemployment February 15, 1983, and we had not given him a layoff slip. As of Monday, February 28, we will terminate Mr. Nickell.

On February 28 Sprenkle and Oberle's son visited Nickell's home. Sprenkle handed Nickell a discharge slip which stated that the reason for Nickell's discharge was, "Lack of work. Teamsters service not required." Sprenkle asked Nickell once again whether he had decided what he was going to do about taking a withdrawal. Nickell replied, "It don't really matter. You're not going to work me anyway, are you?" Sprenkle replied, 'No."

Analysis

The 8(a)(1) Allegations

Paragraph 5(a) of the complaint alleges that the above-described January threat by Paul Oberle Sr. to fire Robert Nickell was violative of Section 8(a)(1) of the Act. I find, however, that the threat of discharge was made because Nickell refused a direct order to teach a fellow employee how to drive the semi. I find no violation here.

Paragraph 5(b) alleges that the February 28 interrogation of Nickell by Sprenkle wherein he asked Nickell whether he had decided what he was going to do about withdrawing from the Union, was in violation of Section 8(a)(1) of the Act. In this case I agree with the General Counsel. Sprenkle's question concerning Nickell's withdrawal from the Union can not be considered in a vacuum. The February 28 interrogation followed a series of similar questions over a period of several months, each instance of interrogation accompanied by an offer of employment dependent on Nickell's agreeing to withdraw. The February 28 interrogation occurred immediately following Sprenkle's handing of the discharge slip to Nickell and must be considered in the context of the discharge or threatened discharge. Thus, it is evident that Sprenkle and Oberle Jr. traveled to Nickell's home for the purpose of discussing his withdrawal from the Union. Neither had ever visited Nickell's home before

[6] By letter dated April 19 Lang offered to settled the grievance. The Union did not accept the offer but subsequently filed the charge in the instant case.

[7] This incident is not alleged as a violation inasmuch as it is barred by Sec. 10(b). It was offered as background.

[8] Ibid.

[9] Ibid.

[10] Ibid.

and, if the purpose had been merely to discharge him, the discharge slip could have been more easily dropped in the mail. Instead, Sprenkle personally handed the discharge slip to Nickell and asked him pointedly whether he had decided about withdrawing from the Union. The question was, in effect, a last, clear chance to avoid termination. If this were not its purpose, that is, if the discharge were final and irrevocable, the question concerning his withdrawal would be meaningless. So, when Nickell hedged on his answer and refused to indicate that he had decided to withdraw from the Union, Sprenkle allowed the discharge to stand. The interrogation was thus not a matter of innocent inquisitiveness, but was a serious attempt at determining Nickell's union status before renewing Respondent's previously made offer of employment dependent on such withdrawal. I find the interrogation clearly violative of Section 8(a)(1) as it contained within it the threat of discharge, dependent on Nickell's reply.

The 8(a)(3) Allegations

Paragraph 6(a) of the complaint alleges that from about November 20, 1982, and continuing to about February 28, 1983, Respondent reduced the hours of employment of Robert Nickell because of his union activity. However, the testimony and record evidence supports Respondent's contention that with the sale of certain equipment by Oberle-Jordre to Bishopric and the reorganization in March 1982, most of the operations at Richmond were moved to Cincinnati or closed down completely with the concurrent layoff of all but five employees due to the change in operations. These five employees continued to be employed at their own request to perform the limited amount of work available on an as-needed basis. Thus, these people waived call-in pay and agreed to work for Respondent despite the fact that full-time work was available only sporadically. Nickell, known to be a member of the Union, was granted his request to be employed on this basis. Thus, there appears to be no antiunion motivation in the cutting of Nickell's hours in March 1982, because if there were, Respondent would not have continued to employ him but would have terminated him with the rest of the employees in the unit. Moreover, Respondent's credited records indicate that from March to June 1982 Nickell was the only employee in the Teamsters unit regularly employed whereas his fellow unit members and members of all other crafts had their own hours drastically cut during this period. Neither grievances nor charges were filed during this period. This fact supports Respondent's position that the reduction in available work was due to economic circumstances and not to motivations discriminatory in nature.

In June, with Respondent's change in plans to remove to New Paris, Nickell's work hours increased substantially over April and May whereas other employees' hours were sometimes increased, sometimes decreased. Additional ironworkers were hired about this time but their need, according to company records, proved somewhat temporary. In July Nickell worked less than an average of 20 hours per week but, then again, only one employee worked as much as two full 40-hour weeks during that month. The Union did not file either a grievance or a charge claiming Nickell's shortage of hours was motivated by discriminatory considerations. Indeed, the records indicate that the problem was clearly economic in nature.

With August came the move to New Paris and the preparations for the move. In that month, Nickell averaged better than 37 hours per week and worked a full 40 hours or more on three occasions. Much of this work, however, was nonunit work, classified as millwright's or operating engineer's work, for which Nickell received a higher wage scale. Several new employees were hired during this period, presumably to help with the move. None of the new employees were classified as Teamsters or truckdriver-mechanics.

In September, Nickell worked two of four weeks full-time and averaged better than 35 hours per week, but again much of the work was that of other crafts. Other employees worked comparable hours.

In October, Nickell worked 3 of 4 weeks full-time and averaged 44 hours per week including, again, substantial work belonging to the ironworkers and operating engineers. Once again, other employees worked similar hours.

In November Nickell averaged better than 38 hours per week including 16 hours of ironworkers' work during the week ending November 2. Although the complaint alleges that the alleged discriminatory reduction in hours began about November 20, Respondent's records indicate that Nickell worked 43-3/4 hours during the week ending November 23 and worked 34-1/2 hours including 20 hours of operating engineers' work during the week ending November 30. Of the 10 employees on the payroll as of November 30, only 2 of the 10 worked a full 40-hour week and 6 out of 10 received a reduction in hours. Nickell's 34-1/2 hours was the third highest worked that week. If, as the General Counsel alleges, Respondent sought to discriminatorily reduce Nickell's hours, about November 20, it was supremely inept at doing so.

The question which comes to mind is why the General Counsel alleged November 20 as the date when the alleged discriminatory reduction in wages occurred when, in fact, there is no evidence to support such a charge. The original charge was filed on May 20, and counting back an exact 6 months (for 10(b) purposes) would give the earliest possible date usable for purposes of alleging any violation. That is the answer to the question.

In December Nickell worked, on the average, a little over 31 hours per week. Sixteen other employees were on the payroll at one time or another in December, and only two of them worked more hours than Nickell. Of 13 employees on the payroll in both November and December, all but one[11] had fewer total hours in December than in November. They also had, as well, a shorter average hourly workweek in December than they did in November. I am convinced by this evidence that the reduction in Nickell's hours of employment was motivated,

[11] An ironworker.

as were the reduction of hours of employment of the entire work staff, by economic considerations.

In January Nickell worked, on the average, a little over 25 hours per week, approximately 9 hours per week performing work ordinarily classified as belonging to operating engineers and millwrights. Nine other employees were on the payroll in January. Five of them averaged more hours than Nickell. However, two of the five were operating engineers and one was a millwright. None of these three worked a full 40-hour week, yet Nickell was given 36 hours of their work. The fourth employee working more hours than Nickell was an ironworker and the fifth was Mark Spille, an employee listed by Respondent as having no occupation. Spille will be discussed infra. None of the employees who worked in January were listed in the company records as performing Teamster unit work. Of the 10 employees on the payroll in both December and January, 6 of them had fewer hours and 3 of them had more hours of employment in January than they did in December. As far as January is concerned, the drop in hours appears economic. Moreover, I cannot see how Respondent can be accused of discriminatorily reducing Nickell's hours of employment when it freely assigned him hours of work in other crafts at a higher hourly rate of pay when, as far a the record indicates, there was no compulsion for it to do so. Far from treating Nickell in a discriminatory fashion, I am satisfied that Respondent treated Nickell with ultimate fairness through January 1983.

The first week in February Nickell worked 20-1/2 hours of which was operating engineers' work. There were, at the time, 11 employees on the payroll. Of the 11 employees, 8 worked more hours than Nickell. Of the 10 employees who were on the payroll both during the pay period ending January 25 and the pay period ending February 1, 6 employees had increases in hours during the pay period ending February 1 over the previous pay period, 2 worked identical numbers of hours while only Nickell and 1 other employee had a decrease in the numbers of hours worked.

During the payroll period ending February 8 Nickell worked just 7 hours, the smallest number of hours since the previous June. Of the other 10 employees still on that payroll, only 1 worked fewer hours than Nickell. However, of the 11, 6 including Nickell had a decrease in hours while the other 5 worked the same number of hours as the week before.

During the week ending February 15 Nickell worked 12 hours including 8 as a millwright. Of the other 10 employees still on the payroll, 3 worked fewer hours than Nickell while 7 worked more. Of the 11 employees on the payroll both during the weeks ending February 8 and 15, however, only 4 including Nickell enjoyed an increase in hours while 2 suffered a loss in hours and 5 worked the same number of hours.

During the week ending February 22 Nickell did not work at all. No other employee who had worked the previous week was laid off along with Nickell. Of the 10 employees on the payroll during the week of February 22 all had their hours increased or else had the same hours as the week before.

In summarizing the number of hours worked by Nickell vis-a-vis other employees between the months of March 1982 through January 1983, it would appear that, for the most part, when the total hours of available work increased, Nickell's hours also increased and that when the total hours of available work decreased, Nickell's hours of employment decreased. This fact would indicate that Nickell was not discriminated against insofar as the number of his hours of employment was concerned as compared to that of other employees. Moreover, Nickell was frequently assigned the work of other crafts so that, if anything, he was treated better than other employees, not discriminatorily. During the first 2 weeks of February 1983, the pattern changed, but not to such an extent that I should conclude that the reasons for Nickell's decrease in hours was discriminatorily motivated, for there may or may not have been other reasons for the decline in the number of hours assigned to him, not apparent from the record. The last day that Nickell worked was February 14. The last incident that might have triggered a shortening of his hours occurred on February 15 when he filed an unemployment compensation claim. Oberle's letter of February 25 notes both that Nickell had filed an unemployment compensation claim on February 15 at a time when he had not been given a layoff slip and that he was going to be terminated on February 28. I conclude that Nickell did not work the last 2 weeks in February because Respondent intended to terminate him on February 28 anyway and, since he had already filed for unemployment compensation, it was decided that it was easier, under the circumstances, not to call him back at all than to call him back to work the last 2 weeks in February. In other words, but for Respondent's intention of laying Nickell off on February 28, he would, more probably than not, have been given some work during the last 2 weeks in February.[12] To that extent, I conclude that Respondent in a way, reduced Nickell's hours of employment and likewise conclude that if his termination is violative, so also was the reduction in hours of employment just before his final termination. Inasmuch as I shall find, infra, that the termination of Nickell on February 28 was discriminatorily motivated, I shall likewise find that the reduction of his employment hours in late February, occasioned by his planned termination, was likewise violative. However, since Nickell did not work at all in late February, for all intents and purposes, he was not so much reduced in hours as, in effect, terminated as of February 15. I so find.

The General Counsel contends that one employee, Mark Spille, worked as a de facto member of the Teamsters bargaining unit and, while Nickell's hours were being substantially reduced, Spille's hours remained constant at 40 hours per week. The General Counsel concludes that Spille "was hired to replace Nickell to perform Teamsters unit work at cut rate wages of $6.25 per hour as compared to the contract rate of $11.20 which was paid to Nickell." The record indicates, however,

[12] Note that I do not find that Nickell was denied employment because he filed an unemployment compensation claim but rather that the planned February 28 termination was moved up to February 15 for the convenience of the Respondent.

that Mark Spille was hired in September 1982 as a clerical/warehouse employee and timekeeper. As far as Respondent's records are concerned, there is no indication that he was intended to take the place of Nickell. Indeed, during October, the first month during which Spille was on the payroll, both he and Nickell worked a full 40 hours each week and, as noted above, Nickell's hours thereafter, through January fluctuated consistently with the hours of other employees engaged in the actual construction end of the business.

Spille, who is the only employee on the payroll who worked a regular 40-hour week throughout the period October-January was, for the most part, engaged in clerical type work. According to his credited testimony he spent 80 percent of his time doing clerical work and project managing. Ten percent of his time was spent helping Sprenkle and Paul Oberle Jr. by making phone calls for them and 10 percent was spent making purchases.

Despite the fact that most of Spille's work was of a clerical nature, he also did some work which was also of the type done by Nickell and some other employees. Thus in the area of purchasing, after ordering a piece of equipment or supplies, Spille would drive a pickup or one-ton truck to the place to pick up the order, then drive it back to the warehouse or to the project site where he would unload or help other employees unload it and, at the warehouse, put it away. He would also occasionally deliver supplies from the warehouse to the projects and vice versa. This type of work had historically been done by the other employees, members of the various crafts, including Nickell, on the basis of convenience. It was not considered as Teamsters unit work alone and no grievances were ever filed over such work assignments. Five to ten percent of Spille's time was used in performing such driver related duties.

In addition to picking up supplies, Spille also swept out the warehouse, painted equipment, washed and waxed trucks, changed oil in trucks and tuned them up. The duties connected with the maintenance of the trucks and equipment was basic mechanics' work previously done by Teamsters unit employees such as Nickell. However, Spille only performed these duties occasionally. Thus, he testified that he only changed oil 10 to 15 times since he was hired and not at all after March 1983. He tuned up only four or five vehicles and washed only five or six during this period and has not washed a truck since October or November 1982. Again, though Nickell was the union steward and was aware of Spille performing these duties since he was hired, he never filed a grievance. Indeed, on two occasions Nickell and Spille worked together on over-the-road hauling jobs which was clearly unit work and the Union raised no objection. These trips were, however, isolated incidents and in any case did not cut into Nickell's hours because they were necessarily two-man jobs and Nickell was one of them.

Nickell testified that, prior to March 1982, 80 percent of his work was truckdriving while 20 percent of his duties consisted of sweeping the warehouse, painting equipment, repairing trucks, moving machinery in and out of the warehouse and from place to place within the warehouse, and working with employees in other crafts.

Since Nickell's termination, Spille has done no over-the-road driving. Rather, he spends 6 to 8 hours per day performing timekeeper's duties and continues to pick up and deliver supplies from time to time, particularly at the Belden site in connection with his duties as project manager. Spille no longer works in the warehouse. According to Paul Oberle Sr., no one works in the warehouse anymore and the repair of trucks and other equipment is contracted out.

I find from the above evidence that the General Counsel has failed to prove by a preponderance of the evidence that Nickell's hours of employment were reduced and Spille's were increased because of Nickell's membership in and activities on behalf of the Union. I arrive at this conclusion based on the fact that, as noted above, Nickell's hours of employment were not reduced, relative to those of other employees until mid-February; that the number of hours he worked were increased by the assignment to him of work within the classification of other crafts at a higher rate of pay, a practice clearly inconsistent with a discriminatory motivation to reduce hours of employment; that most of the work performed by Spille was of a clerical nature, not Teamsters unit work; that other work performed by both Spille and Nickell, i.e., truckdriving in connection with picking up and delivering equipment in small trucks was historically never considered exclusively Teamsters unit work; and that the mechanical work performed by Spille, which had been clearly unit work, was an extremely small percentage of his total hours.

Paragraph 6(b) of the complaint alleges that Respondent discharged Nickell because of Nickell's Teamsters affiliation. Respondent contends that Nickell's termination was due to a lack of truckdriver-mechanic work occasioned by the change in location and in the nature of its operations.

In connection with this allegation I note that, as early as July 1982, Paul Oberle Sr. advised Nickell that Respondent was moving across the state line and would not have to take the Teamsters with it. He told Nickell that he wanted him to go to the union hall and take out a withdrawal. Nickell did not do so.

Sometime between July and December Sprenkle told Nickell that if he withdrew from the Union and stayed with Respondent he would receive $6 per hour in wages and no benefits. Subsequently, he offered Nickell $8 per hour and some insurance if he would withdraw from the Union but stay in the employ of Respondent. In November Nickell was asked what he had decided about withdrawing from the Union.

Meanwhile on September 23, 1982, Respondent advised the Union that it was no longer in need of a Union and that the agreement between them was terminated. Disregarding Respondent's September 23, 1982 letter, the Union, on February 24, 1983, sent contract proposals to Respondent along with a request to negotiate. The following day Respondent sent the Union another copy of its September 23 letter, thus reiterating its position and stating that Nickell, the sole member of the Teamsters still in the employ of Respondent, would be terminated on February 28. True to its word, Respondent's agents,

Sprenkle and Paul Oberle Jr. visited Nickell at his home, gave him the discharge slip which stated "Teamsters service not required," and asked him once again whether he had decided what he was going to do about taking a withdrawal. When asked when the decision was made to terminate Nickell, Paul Oberle Sr. testified, "It was . . . when . . . we were notified that we had to renegotiate the contract."

Thus, it is quite clear that Respondent considered Nickell a good and valuable employee who could not only drive Respondent's vehicles but could perform many duties outside his own occupation—ironworkers', millwrights' and operating engineers' duties as well as general duties. Valuing Nickell's work as it did, but recognizing that there was insufficient Teamsters unit work to employ him full-time as a Teamsters unit member, and consistent with its intention of withdrawing recognition from the Teamsters Union, Respondent several times offered Nickell employment at New Paris provided he withdraw from the Union. The last such offer was made on February 28, on the day of Nickell's termination, in the form of the question as to whether he had decided what he was going to do about taking a withdrawal. It is obvious that the question was asked for a purpose. That purpose, on this occasion, was to offer employment to Nickell provided he withdraw from the Union, just as he had been offered employment on previous occasions with the same proviso. When Nickell obliquely admitted that he had not decided to withdraw from the Union, Respondent determined to permit the termination to stand.

It seems quite evident that Respondent truly desired to keep Nickell as an employee because of his demonstrated value and experience. It is equally clear, however, that Respondent believed that since it had so little actual Teamsters unit work and did not intend to deal with the Teamsters in the future, it had no intention of paying the Union's new wage scale[13] for the general duties to be performed by Nickell. Therefore, it insisted that Nickell withdraw from the Union before being employed by Respondent at New Paris after the contract expired. When Nickell refused to withdraw from the Union, Respondent decided to terminate him. It is a clear violation of Section 8(a)(1) and (3) of the National Labor Relations Act for a company, under the circumstances present here, to refuse employment to an employee because of his union affiliation, and I so find.

The 8(a)(5) Allegations

The record clearly supports the General Counsel's allegations that the Union represented an appropriate unit of Respondent's employees prior to March 1982, that the last collective-bargaining agreement between Respondent and the Union expired February 28, 1983, that the Union requested negotiation toward a new contract in August 1982 and again on February 24, but that on September 23, and again on February 25, Respondent refused to negotiate a new contract on grounds that the unit was down to one man, and Respondent was not obligated to negotiate a labor agreement covering a one-man unit.

With regard to Respondent's contention that there was insufficient Teamsters unit work to provide employment for more than one Teamsters unit member, the record is clear that in February 1982 Respondent employed four Teamsters employees in the truckdriver-mechanic unit and that in March 1982 three of them were terminated. The Union was aware at the time that their unit employees were cut down below one full-time employee, not only because Nickell, the union steward, was still on the job to report events, but because the amount of fringe deductions sent to the Union by Respondent indicated a drastic decrease in claimed unit work being performed. If the Union believed that the driving performed by nonunit personnel picking up and delivering supplies and similar duties was actually Teamsters unit work, it should have filed its charge in March 1982, not more than a year later. Moreover, the mere fact that Nickell was kept on the payroll does not prove that everything he did was necessarily unit work. Indeed, many of the jobs he performed were also historically performed by other trades in conjunction with their own duties, e.g., pickup and delivery of materials. Likewise, many of Nickell's jobs were actually the work claimed by other trades.

In June and July when Nickell's hours decreased substantially, no grievance or charge was filed. The Union's failure to file a grievance or charge at the time indicates that the Union accepted the decrease as economically motivated. In August, when additional employees were hired, no claim was made that they were doing Teamsters unit work. Thereafter, until February 1983 as the work available fluctuated, the employees continued to do some share of the work which they had done historically, such as the picking up and delivering of supplies, without any claim being filed by the Union that this type of driving was Teamsters unit work. I find that the Union, by tacitly accepting this situation over the years, acknowledged that such duties were never considered unit work and that its belated claim that it was, indeed, unit work is without merit.

As far as Spille is concerned, the record indicates that, for the most part, he did clerical work rather than any work even mistakenly and belatedly claimed by the Union. As for his picking up and delivering supplies or driving a truck to run errands, Spille was treated no differently than any other employees including Nickell. This work was never considered exclusively Teamsters unit work and was performed by all crafts on an as-needed basis. The mechanical work performed by Spille, on the other hand, was considered Teamsters unit work and arguably should have been performed by Nickell or another Teamsters unit employee. However, such work was done by Spille only sporadically and neither Nickell nor the Union ever filed a grievance concerning Spille's

[13] The previous scale was $11.20 per hour. It is irrelevant that, as found infra, Respondent would not be obligated to bargain a new contract for the one man unit or to pay a negotiated wage. Quite obviously, Respondent was under the impression that if it kept Nickell in its employ, it would somehow be obligated to pay him the going Teamsters wage. Expecting such a demand from both the Union and from Nickell, it determined that the course of least resistence would be to simply terminate him.

performance of these duties, even though he had done so since his being hired the previous October.

The General Counsel contends that on September 23 there were two Teamsters unit employees on the payroll, Nickell and Daniel Norris, not just one as claimed by Respondent. The record, however, indicates that Daniel Norris was laid off in March 1982 along with the other employees and that, although he returned thereafter every few weeks seeking employment, he was never rehired.[14] I conclude, in agreement with Respondent, that when it refused to negotiate with the Union on September 23 and thereafter, there was only one member of the Teamsters then employed and not enough unit work available to keep one employee busy. Respondent was therefore within the law when it refused to renegotiate the contract to cover the one-man unit and did not, by its refusal, violate Section 8(a)(5)[15] as alleged in paragraph 7(f) of the complaint.

Paragraphs 7(g) and 7(h) allege that Respondent has, since November 20, 1982, unilaterally subcontracted bargaining unit work. I find, however, that the record fully substantiates Respondent's position that its predecessor, Oberle-Jordre, had always subcontracted out a large portion of its truckdriver-mechanic related unit work without objection from the Union, though the contract specifically provided for a grievance procedure to resolve any questions arising concerning its right to do so. I find no merit to this allegation.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating Robert Nickell concerning his withdrawal from the Union Respondent violated Section 8(a)(1) of the Act.
4. By terminating employee Robert Nickell because he refused to withdraw from the Union, Respondent violated Section 8(a)(1) and (3) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Robert Nickell was discriminatorily discharged, I shall recommend that Respondent be required to offer him full and immediate reinstatement, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[16]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Oberle-Jordre Company, Division of The Bishopric Products Company, New Paris, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogationg any employee about union support or union activities.

(b) Discharging or otherwise discriminating against any employee for supporting Chauffeurs, Teamsters, Warehousemen and Helpers of America, Local 135 or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Offer Robert Nickell immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its location at New Paris, Ohio copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[14] Though Norris was offered work for $4 or $5 per hour repairing blocks after hours or on Saturdays, he refused this offer. He testified that prior thereto he had performed this type of work but there is nothing in the contract to indicate that this work was exclusively Teamsters unit work and, in any case, no grievance or charge was filed at the time to indicate that the Union claimed this work was exclusively its own.

[15] *Chemetron Corp.*, 268 NLRB 335 (1984).

[16] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Chauffeurs, Teamsters, Warehousemen and Helpers of America, Local 135 or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Nickell immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

All our employees are free to become or remain, or refrain from becoming or remaining, members of a labor organization.

OBERLE-JORDRE COMPANY, DIVISION OF THE BISHOPRIC PRODUCTS COMPANY